SUPREME COURT, U. S.

No. 38

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF *TMT* TRAILER FERRY, INC.,

Petitioner,

v.

C. GORDON ANDERSON,

Trustee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR ARTHUR H. SHAFFER AND M. JAMES SPITZER, TRUSTEES (CAPLAN MORTGAGEES)

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The Scope of This Brief Is Limited to the Directly Affected Interests of the Caplan Mortgagees

Arthur H. Shaffer and M. James Spitzer as successor trustees to Alex Caplan, trustee under indenture of trust (herein referred to as Caplan mortgagees) were the holders of two first preferred ship mortgages on four vessels owned by the debtor, securing its note in the principal sum of $330,000 (I 31-34, 67-79, I 97-98, 173, 175, 464; II 419-430).*

* The Caplan mortgagees have adopted the same form of record references as are used by petitioner.

The Caplan mortgagees are respondents before this Court, although not named as such in the caption, having been parties to this reorganization proceeding virtually since its inception, the appellants in the first three of the five appeals decided by the Court of Appeals in the proceeding, and party participants in the subsequent two appeals, including at all stages below on the present appeal.

This brief is confined to the directly affected interests of the Caplan mortgagees, namely, the provision in the plan of reorganization dealing with their claim.

The Caplan mortgagees take no position on any of the other issues raised in the briefs of petitioner and The Securities and Exchange Commission (herein referred to as SEC). Without continually reiterating, it is respectfully requested that all references herein to such briefs be understood as intended only as referring to their treatment of the Caplan mortgage claim.

Statutes Involved

Bankruptcy Act Section 27 (11 U.S.C. § 50):[1]

> "Compromises.
>
> "The receiver or trustee may with the approval of the court compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

New York General Business Law § 374:[2]

> "Corporations prohibited from interposing defense of usury.

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[1] Section 102 (11 U.S.C. § 502) makes section 27 applicable to proceeding under Chapter X.

[2] Now § 5-521 of the New York General Obligations Law.

"1. No corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships."

Statement of the Case

No stay of consummation of the reorganization plan was obtained or even sought by petitioner or the SEC. The position of the Caplan mortgagees, alone among all parties to the reorganization proceeding, has in consequence been irreparably harmed

By order filed September 21, 1965,[3] the District Court amended the provision in the plan of reorganization for the Caplan mortgage claim so as to reduce the amount allowed from $280,500 payable in instalments to $250,000 payable upon consummation (SEC Br., p. 13) and continuing the provision allowing unpaid interest as an unsecured claim. The order directed that the Caplan mortgages be satisfied.

Pursuant to such direction, upon consummation of the plan the mortgages were satisfied and discharged of record. Thereupon the assets which had been subject to the lien of the mortgages were encumbered by a new lien in favor of the Florida National Bank of Jacksonville, as security for a loan of funds used in connection with the consummation of the plan (District Court orders, September 27, 1965).

The SEC moved in the Court of Appeals "only to stay the issuance of the new stock" to be issued under the plan of reorganization. It made no application to stay consummation of the other provisions of the plan.

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[3] The District Court orders referred to herein are printed as an Appendix to this brief.

Petitioner joined in the motion of the SEC.

The motion was denied by the Court of Appeals.

The Caplan mortgagees are therefore in a position in which their interests have been irretrievably altered and, alone among all parties to this proceeding, they cannot be restored to their former status.

Preliminary observation on the factual statements contained in the briefs of petitioner and the SEC

Petitioner's purported factual recital is a free-wheeling narration interspersed with inflammatory invectives, abrasive adjectives, and groundless claims of matters being "proven" contrary to the record. We protest strongly against such tactics as being aimed at creating an atmosphere unfairly prejudicial to the Caplan mortgagees, and as irrelevant to the issue of whether the record contains an adequate justification of the compromise provision in the reorganization plan. As is shown below, the attack on that provision is without merit.

It is significant that the brief of the SEC, as might be expected, does not associate itself with the excesses of petitioner. The Commission's statement, however, both as to the history of the proceeding and in respect of the Caplan mortgage claim is so truncated as to omit important indisputable facts and neglects the grossly inequitable treatment accorded that claim from the inception of the proceeding.

The nature of the Caplan mortgage claim

The sections of the opposing briefs relating to the Caplan mortgage claim are devoted wholly to matters other than, and are signally silent upon, the nature of that claim and the consideration on which it rests. Such omission is not inadvertent. Although 10 years have elapsed since the inception of this proceeding-and there has been much litiga-

tion and investigation relating to the claim, neither brief at this late date contains any specifics as to its claimed infirmity or authority that would preclude its enforcement in whole or in part.

In 1956-1957, the debtor operated a fleet of barges towed by tugboats (I 256; II 395, 451, 466, 475; III 140, 144). To enhance its service, it undertook to have a partially completed naval vessel (TMT Carib Queen) converted into a self-propelled ocean-going trailer ship (III 203, 586). Financing was obtained, through the Mellon National Bank, Pittsburgh, Pennsylvania, as Trustee, secured by a ship mortgage insured by the United States Maritime Administration (I 32; II 427, 431, 439-440; 1009-1015, 1019-1035; III 345). By statute such insurance required a predetermination by the Maritime Administration that the operation of the vessel was "economically sound" (46 U.S.C. § 1274(c)).

In May 1957, shortly before the first instalment of principal and interest was due, the debtor required cash—which is the event that gave rise to the Caplan mortgage loan (I 31-32, 272; II 595).

On June 3, 1957, Alex Caplan, as trustee under an indenture for a group of plainly disclosed investors, advanced to the debtor the sum of $330,000, for which it issued the following: (a) a promissory note in that amount secured by two mortgages on three barges and a small vessel; the principal sum was payable January 3, 1958, without interest (and at 6% a year if paid after maturity); the note was convertible, at the option of Caplan, trustee, into shares of common stock of the debtor at the rate of 1 share for each $1.25 of principal amount; and (b) 49,500 shares of such stock (I 32; II 419-430; Dkt. No. 17,117 at pp. 23-53, 163-193). The debtor made numerous inducing representations, including one of solvency, and certified that the the borrowed funds were required "to make pay-

ment on account of a mortgage on the TMT CARIB QUEEN and for other payments" (I 31-33, Caplan Exhibits 2, 3).[4]

All loan documents were entered into with and by Caplan as trustee, and he alone in such fiduciary capacity had the right to collect payment and to pursue available remedies (I 31-34). The names and addresses of the beneficially interested parties were set forth, as required by statute, in the recorded mortgages (Dkt. 17,117 at pp. 24, 164-165; I 464, 174-178).

The $330,000 so advanced by Caplan, trustee, was disbursed on the debtor's instructions (I 32) as follows:

To Mellon National Bank to pay an instalment of interest and principal on the mortgage guaranteed by United States Maritime Administration	$227,314.16
To Mercantile National Bank, Dallas, Texas, to satisfy a preferred ship mortgage on TMT Carolina	51,457.07
To discharge libels against TMT Cuba ..	10,228.77
For recording Panamanian mortgage on TMT Cuba	2,000.00
To debtor	39,000.00
Total	$330,000.00

It will thus be seen that the Caplan mortgages, so harshly characterized by petitioner and the SEC, redounded to the extent of over two-thirds (⅔) of the fresh, new money invested, to the benefit of the United States Government by reducing its liability on its mortgage guarantee. And

[4] The exhibits referred to were included in the documents stipulated by petitioner to have been produced and identified in July, 1958 (31).

the largest part of the balance of the funds was used to clear liens on vessels of the debtor to which they would otherwise have been subject.

In 1958 the Caplan mortgagees voluntarily made available all evidence concerning the "validity" of their claim. Neither petitioner nor the SEC saw fit to exercise their right of interrogation.

Shortly after the involuntary reorganization petition was filed, an order was entered staying all action against the debtor (I 23-24).[5]

On November 13, 1957, Caplan, trustee, sought to vacate the stay in respect of his mortgages and permission to proceed with foreclosure (I 27, 25; II 419-430). The District Court denied the application, Caplan, trustee, appealed, and the Court of Appeals reversed, *Caplan* v. *Anderson,* 256 F. 2d 416, remanding:

> "* * * to afford appellant an immediate hearing and unless immediate and satisfactory provision is made for the protection and satisfaction of his debt, or a clear showing is made that his rights will not be affected by further delay, the stay of proceedings to foreclose his liens must be vacated and he must be permitted to proceed with foreclosure of his lien." (419)

At a hearing on "all matters which may properly come before the Court in accordance with [the] mandate", the District Court questioned the validity of the mortgages, stated that the issues should be tried, that there would be a reference to a Special Master to determine the amount, priority, and validity of the liens, and that an additional

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[5] It cannot be emphasized strongly enough that the Caplan mortgagees had no connection of any kind, directly or indirectly or inspirationally with the filing of that petition (I 21). Their interests as mortgagees or stockholders were directly in conflict with and adversely affected by that petition.

10 days would be allowed for filing objections to claims (I 28-31).

Neither petitioner nor the SEC filed objections to the Caplan mortgage claim (I 28-31).

To forestall delay in obtaining the "immediate" relief to which the Court of Appeals had held the Caplan mortgagees to be entitled, they thereupon—on notice to all parties—took the deposition in Miami of their counsel, M. James Spitzer, who had handled the original transaction (I 31, 62-63). The express purpose of the deposition was "for use in evidence before the District Court" and "for the purpose of establishing by competent evidence the validity" of the mortgages (I 31, 62, 76-77). The reorganization trustee and major creditors were represented and cross-examined (I 31).

The SEC and petitioner defaulted in attending. Subsequently, petitioner stipulated that:

> "The witness responded to all questions propounded to him, including concerning the making of the loan evidenced by the note of $330,000 issued by TMT Trailer Ferry Inc., to Alex Caplan, the trustee, the mortgages given as security therefor, the amounts paid by Alex Caplan trustee therefor and concerning the preparation, execution, filing and recording of the documents all of which pertinent documents were produced and identified." (I 20, 31)

Petitioner's self-laudatory depiction of its heroic efforts to uncover the purported mystery of the Caplan mortgage claim is thus shown to be at variance with the record and its own stipulation. Years before petitioner and the SEC assertedly embarked on getting the facts, the Caplan mortgagees voluntarily invited them to do so. For their own reasons petitioner and the SEC declined. Despite their lack of interest, "all questions propounded" were answered and "all * * * pertinent documents" were placed in the record (I 31, 76).

Every aspect and facet of the Caplan mortgage claim—including much that is far afield—has been minutely scrutinized on the record. Probably no other subject comprises as large a part of the file in this proceeding.

The parol and testimonial evidence referred to in the immediately preceding section of this brief constitutes only a small portion of the record relating to the Caplan mortgage claim.

In 1959, a settlement of the claim had been incorporated in a plan of reorganization that was approved, accepted by creditors and confirmed (I 135-137, 181-185). When the reorganization trustee moved to vest title in the reorganized corporation, the SEC petitioned for an investigation pursuant to § 167 of the Bankruptcy Act on the ground that it might disclose the plan to be unfair in that it would turn the corporation over to persons against whose claims the trustee "may" have defenses and counterclaims (I 37-38, 41, 204, 206, 213-215, 233, 235, 247, 249-251, 302; III 219-224). Essentially, the SEC asserted that it had information that one Joseph Abrams controlled a "number of participants in the mortgage" (I 222-223). At the hearing a representative of the United States Department of Justice (representing substantial tax claims as well as non-tax claims of the United States in excess of $900,000) stated that "these rumors have persisted since 1957, and, so far as I am concerned, they haven't gone unattended". He further stated that:

> "At Your Honor's direction, representatives of the new group and Mr. Anderson, together with their accountants, came to Washington, and myself, with other Department of Justice attorneys, and anyone else who wanted to participate in this hearing, interrogated these men for the better part of a day.
>
> I told them at the outset of this hearing that they were going to be asked some embarrassing questions and

if they were not prepared to answer we had better close the hearing now. And, for Your Honor's information, they said they were prepared to answer and they did answer and I did not find throughout the hearing in any instance an inaccuracy in the information that they gave me.

They gave me written authority to have an audit made of the books and records, which I did. I had all the information appraised.

I did not find anything that indicated to me that further investigation would be warranted. I did not find a sufficient contact between the old management of the Corporation and the new group to indicate any control of the new group by the old group.

Moreover, I didn't find evidence of any causes of action against the old officers of the Corporation that would enhance the assets of this Corporation." (Minutes of Hearing, January 22, 1960, pp. 6-7)

Nevertheless, the SEC petition was consented to by all parties, with the Caplan mortgagees requesting the reorganization trustee and the SEC to "conduct any investigation that they see fit * * * with respect to everyone connected with the [Caplan] group * * * in any manner, shape, or form" (I 482). The Court was informed that all documents would be produced by the beneficiaries of the Caplan mortgage trust "merely upon advice from [counsel for the reorganization trustee] that he wishes to take depositions at any time or place" (I 482).

The trustee's investigation was conducted by deposition procedure, with notice and an opportunity for creditors, petitioner, and the SEC to be represented and to participate (II 582). The only exception was that the deposition of Abrams was conducted *ex parte* by the reorganization trustee and the SEC with no previous notice to the other parties; the transcript was subsequently made available.

On the taking of all other depositions petitioner, the SEC and most major creditors attended and cross-examined (I 258; II 582).

The examination continued from January 29 to May 4, 1960. Thirty-three (33) persons were examined, including all but one of the original and the present trust beneficiaries. The Caplan mortgagees never sought recourse by substantive or technical means to prevent full disclosure of whatever information was sought from them. The trustee in his report to the Court noted that all had given excellent cooperation and furnished all information requested (I 259-260).

They were interrogated not only about their interests in the Caplan mortgages, subsequent transfer or acquisition of such interests, as the case might have been, but also about prior dealings, if any, with the debtor, Abrams, Shaffer, and others, as well as with numerous unrelated corporations with which Abrams either had or was reputed to have had some connection. All but one fully responded to every inquiry. More than 2,200 pages of testimony were transcribed and filed with the District Court. Over 60 exhibits were introduced, including all documents previously identified during the 1958 deposition of M. James Spitzer, in addition to documents relating to transfers of beneficial interests in the trust including that of Bostwick-Westbury Corporation in which Abrams' children had an interest (I 277-278; II 601-602). All testimony was filed and made available to all interested parties (II 582-583).

There is no detail of the Caplan mortgage transaction, however trifling, that is not now in the record. The minimum that can be said is that in consequence of the investigation the District Court had before it everything that could be adduced by the cumulative efforts and the most probing questions that could be propounded by counsel for the reorganization trustee, petitioner, the SEC, and major creditors,—taking turns, *seriatim*.

Despite this mountain of material in the record, petitioner and the SEC are apparently dissatisfied with its adequacy, although failing to point out what additional information they believe they could adduce in the future that they failed to adduce previously.

It is respectfully submitted that rarely has a claim been more examined, scrutinized, pored over, and pondered on than that of the Caplan mortgagees. Moreover, there is nothing about it or even remotely connected with it that is not now in the record and that has not been considered by the District Court and all the parties to this proceeding.

The history of this proceeding is highlighted by a series of broken agreements made with the Caplan mortgagees, grossly prejudicing their position. What is now sought by petitioner and the SEC is an extension of the same inequitable treatment.

Before setting forth the details, it is pertinent to note that at no stage of the proceeding have the Caplan mortgagees sought to avoid meeting squarely any challenge to their claim and at no time have they initiated overtures to compromise. In each instance, when prepared and set to defend their position, they have been the ones who were requested to accept an adjustment.

Caplan, as trustee, duly filed a proof of claim within the prescribed time limit, clearly asserting that "the said mortgages constitute first preferred and superior liens on said vessels and they are subject and subordinate to no claims or liens" (I 27-28, 75-76). No one was uncertain of the position of the Caplan mortgagees (I 50-52, 446, 450, 454-455).

The first appeal by the Caplan mortgagees resulted, as above shown, in a remand to afford "immediate and satisfactory provision * * * for the protection and satisfaction of [the Caplan] debt or a clear showing * * * that [their] rights will not be affected by further delay * * *" 256 F. 2d

416, 419. Instead of granting such relief, the District Court entered an order which, *inter alia*, appointed a Special Master to take testimony on the validity, amount, and priority of the mortgages (I 34-35, 84-87). The Caplan mortgagees thereupon took a second appeal (I 341); the Court of Appeals ordered the appeal expedited and denied a stay of the proceedings before the Special Master without prejudice to renewal if not "promptly and expeditiously conducted and brought to a close." *Caplan* v. *Anderson*, 259 F. 2d 283, 284-285.

Immediately upon rendition of that decision, the reorganization trustee, with the explicit encouragement and express authorization of the District Court, initiated settlement negotiations with the Caplan mortgagees (II 372; I 35, 120, 300-301, 453-455). The trustee proposed a compromise consisting of Caplan withdrawing the then pending appeal, forebearing from foreclosure, and permitting the debtor to continue uninterrupted use of the encumbered vessels. The negotiations culminated in the reorganization trustee promulgating a plan of reorganization recognizing the validity and priority of the Caplan mortgages and incorporating the settlement within it (I 28-31, 34-38, 40, 58-62, 75-77, 80, 84-87, 111, 114-117, 120, 123, 135-137, 181, 185, 443, 446-450, 452-456, 458-460). The trustee reported to the District Court that the settlement would eliminate protracted litigation which, if Caplan prevailed, would render reorganization "impossible by reason of foreclosure of the vessels subject to the Caplan mortgages" (I 459), whereas a settlement would effect a prompt and successful reorganization through the extinguishment of the secured indebtedness (I 111, 114-117, 453-454, 458-460). The Court observed that there was no question but that Caplan had mortgages on the vessels (I 446, 450, 454-455) and concurred in a settlement as a fair solution (II 372).

The plan was accepted or acquiesced in by every creditor with the single exception of the United States of America;

the latter subsequently consented to the plan of reorganization and to the dismissal of its appeal from the orders of approval and confirmation (I 35-38, 41-44, 48-119, 135-137, 181-185, 249-251).

In consequence, no proceedings were had before the Special Master and the order for his appointment was vacated, the reorganization trustee representing to the Court and the latter finding that the "matters which were to be resolved by the Special Master were amicably resolved" (I 191-193).

The pending second Caplan appeal was then voluntarly dismissed because "the lower Court has entered an order approving a plan of reorganization submitted by [the reorganization trustee] * * * acceptable to" the Caplan mortgagees (I 35-38, 167-168, 301).

Throughout the entire period that the foregoing was happening, petitioner and the SEC expressed no objection to the mortgage claim or its compromise and neither filed objections as expressly provided for in the order appointing the Special Master (I 34, 84-87). Significantly, the SEC's objections to the approval and confirmation of the plan of reorganization (I 121-134, 169-171) and of petitioner to its approval make no reference to the Caplan mortgages. No objections were filed by petitioner to the application for confirmation.

It was not until January, 1960 when the reorganization trustee moved to vest title in the reorganized corporation, that the SEC finally came forward (I 219-232). There was then no showing that anything had been ascertained subsequent to the entrapment of the Caplan mortgagees to their irreparable detriment. On the contrary, the SEC's papers dealt with transactions that had occurred in 1955-

1956-early 1957, all or much of which was ascertainable from the debtor's and public records (I 227-229) and that had been referred to prior to the making of the compromise with the Caplan mortgagees and confirmation of the plan of reorganization. There was no claim of newly discovered evidence (I 219-232).

The position of petitioner had been equally negative. It filed objections to approval of the plan, which were more formal than real; attached thereto was a letter from petitioner's counsel referring to many of the items subsequently covered in the reorganization trustee's report (I 126-134). That letter pre-dated the compromise settlement with the Caplan mortgagees (I 128). Petitioner filed no objections to the petition for confirmation. It is noteworthy that before confirmation of the plan and before filing a fee application, petitioner's counsel wrote a letter, addressed solely to the Court, the reorganization trustee and his counsel, referring to alleged influence by Abrams, but concluding, "* * * I do not wish to rock the boat at this time by filing a formal motion, for there may be some good reason that I do not now see why no motion should be filed. For that reason I have not sent copies of this letter to the usual interested parties, and I hope that you * * * will treat it as an informal administrative inquiry" (I 179-181). No protest was made therein by petitioner against the settlement, the plan, or its confirmation, and to the contrary, it recognized that there was no "salvage" for stockholders (I 186).

It was only after the denial of its fee application (I 185-191) that petitioner became impelled to appeal. Curiously, among the claimed compensable services recited as having been rendered by petitioner were conferences with Arthur H. Shaffer looking towards a plan of reorganization (I 190); inconsistently, much of petitioner's present vitriol is now directed at the pre-reorganization dealings of Shaffer.

In consequence of the investigation of the reorganization trustee, the District Court revoked confirmation and set aside the plan of reorganization (I 324), and on February 6, 1961, entered an order in all essential respects identical with the order from which the second Caplan appeal had been taken (II 624). Again, a Special Master was appointed to hear and consider the objections to the Caplan mortgage claim, determine the amounts and priority of liens, etc. (II 25, 624-626).

In other words, two years after the second Caplan appeal was terminated, the case reverted to the same posture as at the inception, with the enormous difference that in the interim the Caplan mortgagees had been lured into an irretrievable loss of position in reliance on a settlement that was dishonored and ignored. On the third Caplan appeal, the SEC recognized that the Caplan mortgagees had been prejudiced by loss of their "strategic position". Moreover, during the interim, cash recoveries from a charter, an insurance loss, and a sale of one of the mortgaged vessels, which rightfully belonged to the Caplan mortgagees, went to the debtor, and others of the mortgaged vessels deteriorated from use (I 301, 317-320, 498).

All of this occurred notwithstanding that the reorganization trustee conceded that it had been his "intention * * * to settle Caplan's rights * * *" and that "it is true that Caplan ha[d]" fully performed his part of the settlement (Trustee's Br., Dkt. 18475, pp. 29, 30).

After the order of the District Court vacating confirmation of the plan of reorganization was affirmed on appeal, 292 F. 2d 455, cert. den. 368 U. S. 956 (1962), the Caplan mortgagees were again ready to stand their ground and defend their position before the Special Master. Again, at this juncture, proposals to settle were put forward, this time by the committee of unsecured creditors and joined in by the reorganization trustee and his counsel (II 41, 659). Such proposals resulted in the provision for the Caplan

mortgage claim contained in the plan of reorganization that is now before this Court.

In recommending approval of the plan and in response to petitioner's contention that the Caplan mortgage claim might be reduced by litigation, the reorganization trustee stated that he had been "advised by his counsel that the outcome of any such litigation is uncertain" and that the compromise was reasonable (II 661-662). He referred to two actions that had stemmed from his 1960 investigation and stated that they were the only ones "considered worthy of prosecution" (II 662).

In response to questions posed by the SEC, the reorganization trustee stated that he would "be glad to" furnish the basis for the compromise (II 283). The Court thereupon stated that, if the SEC desired to go into the matter at length, the hearing would be "set * * * down for another date" (II 283). The SEC's counsel replied: "I have concluded" (II 283).

The reorganization trustee nevertheless responded to a question previously addressed to him as follows:

> "The compromise on the Caplan claim was worked out between the attorney for the group, my attorney and myself. It was done in a conference the three of us had with the court. It was completed after considerable deliberations and negotiations. It was submitted to the court and approved by the court and that is the way we came about to reach that conclusion." (II 284).

The District Court again stated that additional comments could be filed or another hearing date set, but counsel for the SEC turned his attention to a question that he wished to pose to "counsel for the cash proponents" (II 286).

Counsel for petitioner, who only eight days prior thereto had failed to pose any questions relating to the Caplan claim when inquiring of the trustee as to possible "causes of action" possessed by the debtor (II 42, 87-92), again maintained a discreet silence (II 250-259).

The Court concurred in the reorganization trustee's recommendation and "approve[d] the opinion expressed by the attorney for the trustee that no better compromises can be obtained for the debtor, that the prospect of material reduction in the amount of these claims does not warrant the extensive litigation that would otherwise be required * * *" (II 372-373).

No creditor—including the United States Department of Justice, representing large tax and non-tax claims—expressed oral or written objection to the Caplan mortgage settlement provision, either at the hearings held prior to approval and confirmation of the plan or later when amendments were being considered (II 42, 250, 310, 352-356, 763, 796, 896; III 21-66, 83-189, 284-308).

On the appeal to the Court of Appeals from the order of confirmation of the plan of reorganization (which resulted in a remand to accord priority to United States Government non-tax claims), counsel for the reorganization trustee enumerated the reasons why the Caplan mortgage claim had been compromised, namely:

1. the total amount of $330,000 had been disbursed for the specific purposes set forth above, in this brief (*supra*, p. 6);
2. if enforceable according to its terms, the cash outlay by the time of consummation would exceed $500,000 and/or would involve delivery of assets vital to the debtor's business;
3. settlement reduced the principal sum by $49,500, the elimination of legal fees and reimbursement for substantial expenses, while subordinating the

accrued interest to the status of an unsecured claim, with no privilege of converting the principal amount of the claim into new stock;

4. the participants in the Caplan mortgage would have no representation on the board of directors and no meaningful say in the affairs of the reorganized debtor, except as a small minority shareholder;

5. the mortgage transaction was governed by the laws of the State of New York (New York General Business Law § 374), and petitioner's repeated assertion that the mortgages were usurious was unavailing, and the debtor had received a "present fair equivalent value" within the meaning of § 67 of the Bankruptcy Act; and

6. as the participants had no legal interest in the note and mortgages and taking into consideration the fact that there had been assignments of interest by certain initial participants, there were no "mutual debts or mutual credits between the estate of a bankrupt and a creditor" within the meaning of § 68 of the Bankruptcy Act and no offsets were available (Trustees Br. Dkt. 19996, pp. 43-51).

At hearings subsequent to the remand, counsel for the SEC limited his inquiry with respect to the Caplan mortgages to whether:

1. "any attempt [had been made] to negotiate some agreement more favorable to the estate" (III, 45, 46);

2. any litigation would be instituted with respect to the Caplan transaction (III 192); and

3. the Caplan group would accept the plan as amended (III 199).

The plan was approved without objection by any interested party, and subsequently confirmed (III 316-328).

The Caplan mortgagees were, by order of the District Court, required to surrender and satisfy their mortgages (Appendix pp. 35-37).

Opinions Below

The District Court, in its opinion and order filed July 11, 1962 approving the internal and cash plans of reorganization, recited the following:

> "* * * the trustee and unsecured creditors committee appointed by the court to represent that class of creditors were given informal permission by the court to contact the principal lien and priority claimants for the purpose of attempting to compromise and settle the issue involving such claims. This was deemed wise because it was apparent that the liquidation of the issues involved particularly the objection * * * to the Caplan * * * claim * * * would take possibly years to conclude and it was the opinion of the court as well as the trustee and the creditors committee that the financial success of the trusteeship required the early reorganization of the debtor if at all possible." (II 372)

It then stated that such negotiations had resulted in the compromises contained in the proposed internal plan of reorganization, which the Court held to be:

> "* * * fair and equitable under the circumstances and they are hereby approved for inclusion in the internal plan. The court approves the opinion expressed by the attorney for the trustee that no better compromise can be obtained for the debtor, that the prospect of material reduction in the amount of these claims does not warrant the extensive litigation that would other-

> wise be required, and that the prospect of recoveries beyond the amount of the claims as urged by the Securities and Exchange Commission and the stockholders committee is too remote for serious consideration * * * the alternative to approval of these compromises is extensive litigation at heavy expense to the debtor and unnecessary delay in reorganization contrary to the intent and purpose of Chapter X of the Bankruptcy Act." (II 372-373)

The Court of Appeals ultimately affirmed, holding that no creditor had objected and that the compromises constituted a "normal part of the process of reorganization", quoting from *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 130 (1939).

Summary of Argument

The Caplan first preferred ship mortgage claim represents $330,000 in fresh new money that was loaned to the debtor, of which more than two-thirds redounded to the advantage of the United States Government by reducing its liability on a mortgage insured by the Martime Administration. Most of the balance of the money cleared liens to which vessels of the debtor would otherwise be subject.

The debtor's present liability to the Caplan mortgagees substantially exceeds $550,000, which has been compromised under the challenged plan of reorganization for less than one-half, *i.e.*, $250,000 in cash and a non-priority general claim for defaulted interest.

Every minute detail of the claim and of every person interested in it, previously and now, has been subjected to the most rigorous scrutiny and searching investigation. The record contains all the parol and documentary evidence that the combined skill, research, and persistence of the

many counsel for petitioner, the SEC, the reorganization trustee, and the creditors—interrogating separately, *seriatim*—were able to adduce. It consists of over 2,200 pages of testimony by 33 witnesses, taken over a period of five months, and more than 60 exhibits, in addition to the deposition of counsel for the Caplan mortgagees taken to establish the validity of the mortgages.

When the provision in the reorganization plan compromising the Caplan mortgage claim was approved, the District Court was in a position to make a reasoned, objective, meaningful evaluation of the claim. Not only did it have all that material before it, but also the vast accumulated information obtained over several years from multifarious proceedings involving the claim and which resulted in three separate appeals to the Court of Appeals.

The briefs of petitioner and the SEC fail to indicate any aspect of the claim either missing from the record or that further exploration would produce. That is particularly pertinent when taken in the context that when given ample opportunities to inquire both petitioner and the SEC failed to do so. Thus: (a) when a deposition was taken to prove the validity of the Caplan mortgages, both petitioner and the SEC, although given notice, defaulted; (b) for a period of more than two years neither petitioner nor the SEC filed any objections to the Caplan mortgage claim; (c) when SEC counsel interrogated the reorganization trustee as to the reasons for the compromise, and the District Court offered to permit SEC counsel to continue the interrogation at a continued hearing or to submit written comments, the reply was, "I have concluded"; and (d) at such hearing—as well as at other hearings—petitioner's counsel made no inquiry.

Settlement of a claim is a routine and "normal part of the process of reorganization", *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 130 (1939). The exercise by a District Court of its discretion in approving such a

settlement is, as the Courts of Appeals have held, not to be set aside unless clearly wrong. *In Re Riggi Brothers Co., Inc.*, 42 F. 2d 174 (2nd Cir., 1930), *cert. denied sub nom. Wood & Selig* v. *Todd*, 282 U. S. 881 (1930); *In re Prudence Co., Inc.*, 98 F. 2d 559 (2nd Cir., 1938), *cert. denied sub nom. Stein* v. *McGrath*, 306 U. S. 636 (1939). This is especially true where a review of the record in its entirety demonstrates that the party seeking to upset the settlement was aware of the controversy to be settled and was able to evaluate its merits. *In re Kansas City Journal Post*, 144 F. 2d 816 (8th Cir., 1944); *Fernow* v. *Gubser*, 136 F. 2d 971 (10th Cir., 1943); *Scott* v. *Jones*, 118 F. 2d 30 (10th Cir., 1941).

The briefs of petitioner and the SEC are significantly silent in specifying any infirmity in the mortgage claim or in citing any authority that precludes enforcement. From time to time three claimed defenses have been asserted none of which has any merit:

(a) Usury—The transaction by its terms and by reason of all its phases having occurred in New York, was subject to the laws of that State. The New York General Business Law specifically provided that:

> "No corporation shall hereafter interpose a defense of usury in any action."

The decisions are unanimous that there is no validity to that defense. *Manufacturers Finance Co.* v. *McKey, Trustee in Bankruptcy*, 294 U. S. 442, 452 (1935); *Hubbard* v. *Tod*, 171 U. S. 474, 501 (1898). See also, *Jenkins* v. *Moyse*, 254 N. Y. 319, 172 N. E. 521.

(b) Fraudulent transfer under § 67 of the Bankruptcy Act —It is conceded that the Caplan mortgagees invested $330,000 and that the corporation used those sums to pay its obligations. Financing was not available on more advantageous terms, and stockholders and creditors alike all received the advantages of the mortgage transaction with-

out which an immediate bankruptcy would have occurred. The debtor received "a present fair equivalent value" within the meaning of § 67 of the Bankruptcy Act.

(c) Potential Claims Against individual participant—The note secured by the Caplan mortgages was payable solely to Caplan as trustee, who was the mortgagee named in both mortgages. All benefits conferred by the mortgages redounded expressly and exclusively to him or to the successor trustees, who had legal title to the note and mortgages. No direct rights of any kind were conferred on the participants. There exist no "mutual debts or mutual credits between the estate of a bankrupt and a creditor" § 68, Bankruptcy Act; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181 (1900). This is especially true in view of the many assignments of interest to holders of beneficial interests who were not parties to the original transaction.

In compliance with the District Court order of September 21, 1965, the Caplan mortgagees have satisfied their mortgages and discharged their liens, thus enabling the debtor to obtain new financing and continue in business as a going concern. A new lien now encumbers the vessels which were formerly the subject of the Caplan mortgages, and as to those mortgages the *status quo ante* cannot be restored (App. 35-42).

ARGUMENT

I. The record permits an adequate evaluation of the Caplan mortgage claim, discloses the basis for settlement, and demonstrates that the District Court properly exercised its discretion.

The record contains, and the District Court had before it when the compromise settlement of the Caplan mortgage claim was approved, everything that could be adduced by the combined ingenuity, diligence, research, and perseverance of the various counsel for petitioner, the SEC, and all other parties to the proceeding.

When the Caplan mortgagees originally voluntarily took the deposition of their counsel to establish the "validity" of their claim, neither petitioner nor the SEC saw fit even to attend despite the fact that they were given timely notice. It was stipulated that "all questions propounded" were answered and that "all of [the] pertinent documents were produced" (I 31).

When the reorganization trustee subsequently conducted his investigation, he spent approximately five months in doing so, interrogated 33 different persons, and took over 2,200 pages of testimony. That investigation was characterized by the SEC on the prior appeal as "exceptionally thorough" (SEC brief, p. 31, Dkt. No. 19,996).

The querulous carpings aside, neither petitioner nor the SEC indicates a single respect in which the present record is deficient as to the Caplan mortgage claim or its compromise, or what, if given another chance, could now be added.

The propriety and desirability of settling claims in bankruptcy reorganizations was recognized almost thirty years ago in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 130 (1939). This Court there held that claims frequently arise which "may in the discretion of the Court" be more wisely settled than litigated and that such settlements "constitute a normal part of the process of reorganization." Accord, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U. S. 523, 565 (1943).

Chapter X of the Bankruptcy Act did not circumscribe the Court's power to approve such compromises, Senate Hearings on H. R. 8046, 75th Congress, 2d Session (1937-1938), at p. 126. The criterion is the proper exercise of the District Court's discretion, irrespective of whether the settlement is effected during the course of the reorganization proceedings or in the body of the plan itself. See 6A *Collier on Bankruptcy*, ¶ 8.07, pp. 2431-2433; 2 *Remington*

on Bankruptcy, § 1155, p. 636; 8B C.J.S. *Bankruptcy*, § 910, p. 754; Bankruptcy Act, §§ 27, 102.

Unless the District Court can be said to have been "clearly wrong" in approving a compromise, its discretion will not be set aside. *In re Riggi Brothers Co., Inc.*, 42 F. 2d 174 (2nd Cir., 1930), *cert. denied sub nom. Wood & Selig* v. *Todd*, 282 U. S. 881 (1930); *Connecticut Railway & Light Co.* v. *New York, New Haven & Hartford Railroad*, 190 F. 2d 305 (2nd Cir., 1951); *In re Prudence Co., Inc.*, 98 F. 2d 559 (2nd Cir., 1938), *cert. denied sub nom. Stein* v. *McGrath*, 306 U. S. 636 (1939).

There is no requirement that the District Court litigate objections to claims or adjudicate the issues. As the Fifth Circuit held in *Florida Trailer Equipment Co.* v. *Deal*, 284 F. 2d 567 (1960), "the very uncertainties of outcome in litigation as well as the avoidance of wasteful litigation and expense" is at the foundation of the power to compromise. See *In Re Prudence Co., Inc., supra*, at 98 F. 2d 559.

In *Riggi, supra*, the validity of a mortgage was questioned; the District Court's approval of a compromise was upheld because:

> "It is quite enough to know that the trustee would have met with serious opposition in trying to free the property from the mortgage lien. While he might perhaps have succeeded, the nature of the legal problems involved were such that the expense, delay and likelihood of failure may well have made a compromise settlement advisable." (p. 177)

Accord, *In Re Anderson, Thorson & Co.*, 125 F. 2d 325 (7th Cir., 1942); *In Re Albert Harris, Inc.*, 313 F. 2d 447 (6th Cir., 1963); *Scott* v. *Jones*, 118 F. 2d 30 (10th Cir., 1941); *Pullman Couch Co.* v. *Eshelman*, 1 F. 2d 885 (4th Cir., 1926), cert. denied 266 U. S. 631 (1925); *Fernow* v. *Gubser*,

136 F. 2d 971, 972 (10th Cir., 1943); *Daniel Hamm Drayage Co.* v. *Wilson,* 178 F. 2d 633 (8th Cir., 1949); *In re Kansas City Journal-Post Co.,* 144 F. 2d 816 (8th Cir. 1944).

Although both the SEC and the petitioner cite several cases in which reorganization plans were upset on appeal, they do not dispute the authority of the foregoing principles. Moreover, the facts in those cases are sharply distinguishable from the facts in the instant case.

In *National Security Co.* v. *Coriell,* 289 U. S. 426, the receiver had "submitted no facts and made no recommendations". There was no evidence on which the District Court could have found that "a majority of the unsecured creditors favor the plan". In addition, there had been no valuation of assets by a disinterested appraiser, no account of the results of the operations during a five-month period, no account of the results of the operations under the receiver, no independent schedule of liabilities of the corporation showing the number of creditors, the amount owed to each, or the collateral held (289 U. S. at 435-436).

Ashbach v. *Kirtley,* 289 F. 2d 159 (8th Cir., 1961), involved a claim of the debtor that had been reduced to judgment in an amount exceeding $500,000 and settled for one-fifth of that amount, with neither the trustee nor his attorney initially recommending acceptance and with the creditors and stockholders demanding a further investigation to determine whether the judgment debtor had been secreting assets.

Similarly inapposite is *Chicago Rapid Transit,* 196 F. 2d 484 (7th Cir., 1942), wherein the District Court approved an acknowledged "businessman's settlement" of a claim found by the Court of Appeals to be "utterly fantastic" on the record before it. It is pertinent to note that it was held therein: "it may be that the acceptance by a large

majority of creditors and opposition by an inconsequential number or amount would of itself constitute a reasonable basis for approval by the court without consideration of the merits of the claim or claims thus disposed of" (p. 490). See also 2 *Remington on Bankruptcy*, § 1161, p. 644.

Conway v. *Silesian-American Corp.*, 186 F. 2d 201 (2d Cir. 1950), is likewise greatly different from this case. There a plan of reorganization was attacked by creditors as well as stockholders, and the plan itself was predicated upon the trustee's decision not to prosecute claims as to which the Circuit Court found the equities in favor of the estate to be "very strong" as against "essentially no equities whatsoever in favor of [the prospective defendants]".

In addition to relying on wholly inapposite cases, both opposing briefs isolate from their context some quoted excerpts from the testimony of the reorganization trustee and the opinion of the District Court relating to the compromise of the Caplan mortgage claim. Both briefs carefully omit that on the hearings at which the trustee gave the quoted testimony, the Court stated to SEC counsel that it had a "jury out and another one coming on this afternoon" and that if he wished to continue his inquiry the Court would be willing to set the matter down for another day. SEC counsel replied: "I have concluded." (II 283)

The SEC counsel nevertheless, requested that the trustee respond to the question, with which request the trustee complied. SEC counsel did not ask for further time for cross examination or to produce any other evidence. Instead, he stated that he had some comments, and, the Court again reminding him of the time problem, offered to receive the comments in writing or to set another date and that "I [the Court] will be happy to have the Government enter into a consideration of these claims and I invite them to participate in them" (II 283-285).

Throughout all of this, petitioner's counsel—who only days before had questioned the trustee with respect to possible causes of action possessed by the debtor without going into the Caplan claim (II 87-92)—maintained silence.

At two separate hearings after the remand (*United States* v. *Anderson*, 334 F. 2d 111), SEC counsel made no claim that there was inadequate information of record on which to predicate a reasoned judgment, or that the settlement was inappropriate.

Again, petitioner's counsel was deafeningly silent.

As for the District Court, it had been concerned in depth with the Caplan mortgage claim over a period of many years and through multifarious proceedings that led to three appeals to the Court of Appeals.

It is significant that the creditors, whose interests are vitally affected, have not objected to the compromise and, even after receiving the benefits of the views of petitioner and the SEC, still do not object. That is equally true of the United States Department of Justice, representing large tax and non-tax claims, which did not, and does not, object to the plan provision for the Caplan mortgage claim.

It is respectfully submitted that the position of petitioner and the SEC in respect of the Caplan mortgage claim is without merit.

II. The Caplan mortgages are valid and enforceable in the full face amount together with interest and costs.

The Caplan mortgage claim has been assailed on three grounds, none of which has validity.

1. *Usury*—Because the debtor, for the sum of $330,000 advanced to it, issued both a note, secured by mortgages in that amount, and 49,500 shares of stock.

Among the written representations made by TMT to induce the making and effectuating of the transaction was the following:

> "All elements of the loan transaction involving the indebtedness of TMT Trailer Ferry, Inc. to Alex Caplan, as Trustee under indenture dated May 31, 1957, in the sum of $330,000, having occurred within the State of New York, including, among other factors, negotiation of said loan, the making, execution and delivery of said instruments, the payment of the consideration therefor, and payment thereof being due within the State of New York, it is the intention of TMT Trailer Ferry, Inc. to be bound by the laws of the State of New York in respect of said loan transaction and all aspects thereof including but not limited to enforcement of the mortgages securing said loan, and that said loan transaction and all instruments executed in connection therewith and as collateral security therefor, shall be interpreted under and governed by the laws of the State of New York." (I 33-34)

The undisputed testimony establishes that each such recital was literally and precisely true (I 31).

Section 374 of the New York General Business Law mandates that:

> "No corporation shall hereafter interpose the defense of usury in any action."

The decisions are unanimous on this point:

Jenkins v. *Moyse,* 254 N. Y. 319, 172 N. E. 521 (1930);

New York Credit Men's Association v. *Manufacturers Discount Corp.,* 298 N. Y. 512, 80 N. E. 2d 660 (1948);

Hubbard v. *Tod,* 171 U. S. 474, 501 (1898);

Manufacturers Finance Co. v. *McKey, Trustee in Bankruptcy,* 294 U. S. 442, 452 (1935).

2. *Fraudulent Transfer Under § 67 of the Bankruptcy Act*—As the debtor required cash, the Caplan mortgagees paid "a present fair equivalent value" for the note and mortgages, and better terms were unavailable elsewhere. Subdivision (6) of § 67-(d) provides that "such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair as defined in this subdivision (d) for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment". Survival of the debtor and revival of its fortunes was plainly anticipated as evidenced by the fact that the note was non-interest bearing until its stated maturity and was then convertible into stock. Manifestly, the Caplan mortgagees did not invest $330,000 in new money in order to purchase the problems attendant on a bankruptcy or reorganization proceeding.

In *Asel* v. *Cook,* 23 F. 2d 256 (8th Cir. 1927), it was held that a factor to be taken into account in determining fair value is that "the Corporation was critically embarrassed by large indebtedness shortly coming due and by urgent need of new capital" and that "After endeavoring to raise the necessary funds from other sources, the managing officers of the Corporation applied" to the creditor whose transaction was attacked (p. 257). The Court held that the transaction had been "fully executed upon both sides and it is impossible to place the parties as they were before such execution. To grant the relief here sought would give the Corporation creditors all of the advantages resulting from the contract * * *. Such a contention makes no legitimate appeal to a court of equity" (p. 257).

To the same effect:

Kenneally v. *Standard Electronics Corp.,* 364 F. 2d 642 (8th Cir. 1966).

See also *Matter of Peoria Braumeister Co.*, 138 F. 2d 520 (7th Cir. 1943), in which, notwithstanding that the consideration was unfair, the chattel mortgage therein involved was held enforceable to the extent of the amount actually advanced.[6]

3. *Potential Claims Against an Individual Participant*— The note on which the Caplan mortgages rest is payable solely to Caplan, as trustee, who is the mortgagee named in both mortgages. All benefits conferred by the mortgages redound expressly and exclusively to the mortgagee, namely, the trustee-successors to Caplan, trustee, who have legal title to the note and mortgages; no direct rights of any kind are conferred on the participants. The Caplan trustees may enforce the mortgages according to their terms, free of claims assertable against any participants, who have no legal interest in the note and mortgages, and who by express language in the trust indenture are relegated solely to the right to receive a certificate of beneficial interest from the trustees. Moreover, if any claims were asserted by the reorganization trustee against an original participant whose interest in the transaction had been assigned (*e.g.*, Bostwick-Westbury Corporation, in which Abrams' daughters had an interest, and whose participation in the Caplan mortgages was transferred), it would not adversely affect enforceability of the note and

---

[6] Petitioner erroneously refers to the trustee's report of investigation and claims that there has been a "proven" fraud. The District Court disavowed having reached any such conclusion (Hearing 1/27/61. p. 15).

Both SEC and petitioner, without benefit of record references, seek to further color the proceedings by adverting to an alleged agreement between the Caplan mortgagees and Merrill Stevens to procure acceptance of the 1959 plan of reorganization. The fact that the successor trustee (Worton) indicated that there had been a "misunderstanding" (Hearing 6/29/59; I 39-40) and offered no evidence in support of his petition to vacate the plan of confirmation is omitted from the recitation of facts.

mortgages. An assignee's interest is not subject to satisfaction of his assignor's obligation.

§ 68 of the Bankruptcy Act provides for set-offs where there are "mutual debts or mutual credits between the estate of a bankrupt and a creditor". That provision is applicable to Chapter X. *Moore on Corporate Reorganization,* Vol. 2, pp. 2819-2820), ¶9.09; *Matter of Rosenbaum Grain Corporation,* 103 F. 2d 656 (7th Cir. 1939); *In re Busch Terminal Co.,* 93 F. 2d 661 (2d Cir. 1938). Debts or credits must be not only mutual but "in the same right and between the same parties, standing in the same capacity". 4 *Collier on Bankruptcy,* 14th Ed., pp. 726-728, ¶68.04.

Dickerman v. *Northern Trust Co.,* 176 U. S. 181 (1900), was an action to foreclose a mortgage given to secure the underlying bonds that were originally issued to investors, who also received stock as a bonus, and to promoters who were charged with fraud. In affirming a decree of foreclosure, it was held that "the bonds must be treated as an entirety" (p. 206) and that:

> "Assuming these facts to have made out a case of fraud in the organization of the Straw Paper Company, and in the purchase of the mill properties, it is difficult to see how they affect the validity of the bonds as a whole, the right of the trustee to foreclose, or how they can entitle the complainant to compel the bondholders, so far at least as they were innocent holders, to set off their indebtedness to the paper company for stock, against the indebtedness of the company upon the bonds." (p. 200)

See also, 37 Am. Jur. *Mortgages,* § 578.

There being no valid defenses to the Caplan mortgage claim, and there being ample support of record for its compromise, and the mortgage liens having been discharged

and superseded by a new subsequent lien, the position of the petitioner and the SEC is unwarranted as a matter of law and is inequitable.

CONCLUSION

The provision in the plan of reorganization relating to the Caplan mortgages meets all statutory requirements and should not be disturbed.

Dated: New York, New York, October 20, 1967.

Respectfully submitted

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Ronald J. Offenkrantz
Jackson L. Peters
Attorneys for Respondents,
Caplan Mortgagees

Knight, Smith, Underwood & Peters
Spitzer & Feldman
of Counsel

APPENDIX

District Court Order, dated September 20, 1965.

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN BANKRUPTCY—No. 3659-M

In the Matter of:

TMT TRAILER FERRY INC. et al.,

Debtors.

ORDER APPROVING AMENDMENT TO INTERNAL PLAN OF REORGANIZATION AS AMENDED

This cause came on for hearing on the Trustee's Proposed Amendment to the Plan of Reorganization which amendment would provide for payment of $250,000 in cash upon the consummation of the Plan to the holders of the Caplan Mortgage claims. The Plan as it now exists provides for payment to said claimants of $280,500 over a period of five (5) years with certain deferred payments bearing interest at 6% per annum secured by a lien on one of the vessels of the debtor. No other changes are proposed in the other provisions of the Plan for the settlement of the Caplan Mortgage claims.

It appears that the proposed settlement has been approved by the Board of Directors of the reorganized debtor, and it is the opinion of the court that the proposed modification of the Plan does not materially and adversely affect the interests of creditors and stockholders, but on the

contrary is in the best interests of the debtor and of the reorganized company.

It has been further shown by evidence before the court that the debtor will be able to pay the $250,000 required on consummation by the proposed amendment, and will have sufficient funds to do so without impairing the financial stability of the reorganized company. It further appears that notice has been given to parties in interest that a proposed favorable cash settlement of these claims would be presented to the court at the hearing held in this cause on September 20, 1965, and that further notice of the proposed amendment to the Plan of Reorganization is not required. Wherefore it is

ORDERED, ADJUDGED and DECREED that Paragraph 2 of Part III of the INTERNAL PLAN OF REORGANIZATION AS AMENDED is hereby amended so as to read as follows:

> 2. The creditors in Class 4 shall be paid as follows: The Caplan Mortgage claim which is in the principal sum of $330,000 plus interest, costs and attorneys fees, and to which various objections have been filed by the Trustee and others, shall be compromised and settled for the purpose of this plan, and this plan only, as follows:
>
> a. The principal sum is reduced to $250,000 and will be paid in cash upon substantial consummation of the plan of reorganization.
>
> b. The Trustees of the Caplan mortgage shall satisfy their existing mortgages encumbering the vessels TMT PUERTO RICO, TMT CAROLINA, TMT GEORGIA and TMT CUBA.
>
> c. This claimant is allowed an unsecured claim for a sum equal to 6% interest on $280,500 from January 3, 1958, to the date of payment of the said

$250,000. Such claim shall be treated the same as the unsecured claims provided for in paragraph 6 below.

d. This claimant waives all claims for costs, attorneys fees, interest, and all other claims against the debtors other than those set forth above.

DONE and ORDERED at Miami, Dade County, Florida, this 20th day of September, 1965.

EMETT C. CHOATE,
United States District Judge.

Certified to be a true and correct copy of the original.
Joseph I. Bogart, Clerk
U. S. District Court
Southern Dist. of Fla.

By Jerry F. Haven
Deputy Clerk

Date: 10-16-67

District Court Order Approving Loan to Reorganized Company.

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

IN BANKRUPTCY—No. 3659-M

In the Matter of:

TMT TRAILER FERRY INC. et al.,

Debtors.

ORDER APPROVING LOAN OF $1,250,000 TO THE REORGANIZED COMPANY

THIS CAUSE came on for hearing September 20, 1965, pursuant to proper notice to parties in interest, on the Trustee's PETITION FOR SUBSTANTIAL CONSUMMATION OF PLAN OF REORGANIZATION. Among the essentials for consummating the plan is the $1,250,000 loan which the reorganized company is authorized to make pursuant to Paragraph 3 of Part VII of the INTERNAL PLAN OF REORGANIZATION AS AMENDED.

The Trustee, with the approval of the new Board of Directors of the reorganized company, has negotiated the required loan with The Florida National Bank of Jacksonville. Attached hereto is a copy of the proposed Promissory Note. The loan is to be secured by mortgages in conventional form encumbering the five vessels now owned by the debtor and all of the motor vehicle equipment of the debtor. All costs and expenses of the loan are to be paid by the borrower, including reasonable attorney's fees

for the lender's counsel. It is understood that the borrower may not require the full amount of the $1,250,000 loan and may draw the amounts required by it in varying amounts from time to time, in which events interest will be charged only on unpaid balances.

All of the assets and property of the debtor will be transferred by the Trustees to the reorganized company with the exception of certain choses in action and funds required to secure the payment of unliquidated claims payable in full in cash. A portion of the proceeds of the $1,250,000 loan will be required to create such funds. Reference is made to a companion order entered this day entitled ORDER APPROVING CONSUMMATION OF PLAN OF REORGANIZATION for provisions governing the creation of these funds, totaling $1,116,615.60, and transferring to said funds all unliquidated claims and liens against the debtor required to be paid in full in cash. This will leave the assets and property of the reorganized company free and clear of any claims or liens against the debtor except for current liabilities, and will enable the loan from the bank to be secured by a first lien against the vessels and vehicle equipment of the reorganized company.

No objections have been made to the making of this loan by the reorganized company and it is in the best interests of the debtor and should be approved.

Wherefore it is

ORDERED, ADJUDGED and DECREED as follows:

1. The proposed loan of $1,250,000 by The Florida National Bank of Jacksonville to the reorganized debtor company, TMT Trailer Ferry, Inc., a Delaware corporation, upon the terms as outlined herein, be and the same is hereby APPROVED.

Promissory Note Attached to Order Approving Loan to Reorganized Company.

2. The said loan will be secured by a first lien encumbering the five vessels now owned by the debtor and all of its motor vehicle equipment, and all such encumbered property will be free and clear of all claims and liens against the debtor and its property.

3. The Trustee, C. Gordon Anderson, and the officers and directors of the reorganized company are authorized and directed to execute any documents required to consummate said loan and to take such further actions as may be necessary or expedient in their discretion in closing said loan.

DONE and ORDERED at Miami, Dade County, Florida, this 28th day of September, 1965.

s/ EMETT C. CHOATE,
United States District Judge.

Promissory Note Attached to Order Approving Loan to Reorganized Company

$1,250,000.00 Miami, Florida

August , 1965

ON OR BEFORE the day of October, 1969, FOR VALUE RECEIVED, the undersigned promises to pay to the order of THE FLORIDA NATIONAL BANK OF JACKSONVILLE, at its banking offices in Jacksonville, Florida, or at payee's option, at such other place as may be designated from time to time by the payee, the principal sum of ONE MILLION, TWO HUNDRED FIFTY THOUSAND AND NO/100 ($1,250,000.00) DOLLARS, together with interest thereon at the rate of six per cent

(6%) per annum, from and after the date hereof, the principal indebtedness evidenced hereby and interest to be paid in installments as follows:

> Principal payable in fifty (50) equal monthly installments of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS each, beginning with the day of September, 1965, and continuing thereafter in equal monthly installments of like amount, on the day of each and every month thereafter, to and including October , 1969. Interest payable monthly, concurrently with principal payments.

Maker reserves the privilege of prepaying, without penalty, all or any part of the indebtedness evidenced by this note, principal and interest; however, in the event of partial prepayment, the same shall not relieve the maker or endorsers from the obligation of paying the installments as they become due and payable according to the tenor hereof.

This note is secured by a chattel mortgage encumbering personal property owned by the Mortgagor, together with mortgages encumbering the following vessels: TMT "SAN JUAN" TMT "GEORGIA," TMT "CAROLINA," TMT "BISCAYNE" and TMT "FLORIDA." The covenants and conditions set forth or referred to in said mortgages are hereby incorporated in this note as covenants and conditions of the undersigned, with the same force and effect as though such covenants and conditions were fully set forth herein.

If default be made in the payment of any installment of principal or interest or in respect to any of the said covenants or conditions of the aforementioned mortgages, then, at the option of the holder hereof, the entire prin-

cipal sum remaining unpaid, together with accrued interest, shall become immediately due and payable without notice.

The maker and each endorser hereof further agrees, jointly and severally, to pay all costs of collection, including a reasonable attorneys' fee, in case the principal of this note, or any payment on the principal or any interest thereon is not paid at the respective maturities thereof, or in case it becomes necessary to protect the security hereof, whether suit be brought or not.

The maker and endorsers hereof severally waive demand, protest and notice of maturity, nonpayment or protest and all requirements necessary to hold each of them liable as maker and endorsers.

Deferred principal and interest payments shall bear interest at the rate of eight per cent (8%) per annum from their respective maturities until paid.

TMT Trailer Ferry, Inc.

By .....
President

Attest:

.....
Secretary

District Court Order Approving Consummation of Plan of Reorganization.

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN BANKRUPTCY—No. 3659-M

In the Matter of:

TMT TRAILER FERRY INC. et al.,

Debtors.

ORDER APPROVING CONSUMMATION OF PLAN OF REORGANIZATION

This cause came on for hearing on September 20, 1965, pursuant to proper notice to parties in interest on the Trustee's PETITION FOR SUBSTANTIAL CONSUMMATION OF PLAN OF REORGANIZATION. It appears that pursuant to previous orders of this court the Trustee has taken certain steps toward consummating the plan. The initial meeting of the Board of Directors of the reorganized company has been held and a copy of the minutes thereof filed in this cause. No objection has been made to any of the actions taken at said meeting and it appears that all of the matters decided were consistent with the plan of reorganization in the best interests of the debtor and should be approved by the court.

The Trustee has presented evidence outlining his plans for paying those claims required to be paid in cash upon consummation and it appears that such claims total $1,446,030.56 of which $1,116,615.60 are governmental

claims in classes 1, 2 and 3 which have not been the subject of orders of the court determining the exact amount to be paid. The plan of reorganization provides that any such unliquidated claims shall be protected upon consummation by setting aside under the Trustee a sum sufficient to pay such claims in full. The Trustee will be directed to create such a fund of $1,116,615.60 at the time of substantial consummation for the benefit of the following unliquidated claims:

a) For all claims of the United States of America for taxes, being all of the claims under Class 1	$ 192,101.68
b) For all other claims of the United States of America, generally referred to as the government non-tax claims, and being all of the claims in Class 2	904,737.84
c) For all of the tax claims of other governments and political subdivisions thereof in Class 3, *except* claims of the Commonwealth of Puerto Rico*	19,776.08
Total	$1,116,615.60

The Trustee also presented evidence outlining his plans for issuing the new common stock of the reorganized company to creditors entitled thereto under the plan. The claims involved total approximately four million dollars, including $189,300 in debenture bondholder claims that have not been liquidated as to the exact amount due each claimant, and the Trustee proposes to issue to each creditor

*Claims of the government of Puerto Rico have been liquidated and allowed by the court in amount of $63,947.25.

entitled to stock one share for each $3.10 of his claim with no fractional shares to be issued. This will dispose of approximately 1,300,000 shares, the number provided for in the plan.

The Trustee also presented evidence showing pro forma balance sheet of the reorganized company after giving effect to transactions required to consummate the plan, and it appears that consummation at this time will be feasible. The debtor will require the proceeds of the $1,250,000 loan which the plan authorizes the reorganized company to make. The Trustee has advised that the loan is available from The Florida National Bank of Jacksonville on conventional terms and within the provisions of the plan. A separate order will be entered specifically approving the terms of this loan which will be secured by a first lien on all the assets of the reorganized company and will constitute its only indebtedness other than current liabilities arising out of the normal operation of the business.

The Trustee desires to proceed promptly with the consummation of the plan and the transfer to the reorganized company of all assets of the debtor other than those to be retained in the Trusteeship under the plan. It is the opinion of the court that the plan should be consummated without further delay.

WHEREFORE, it is

ORDERED, ADJUDGED and DECREED as follows:

1. All actions taken by the new directors of the reorganized TMT TRAILER FERRY, INC. at their organization meeting held in Miami, Florida, on August 23, 1965, as shown by the minutes of said meeting filed herein by the Trustee on September 9, 1965 are hereby RATIFIED and APPROVED, and the officers and directors of the reorganized

company are authorized to take such further actions as may be required to carry out those approved at said meeting and to operate the business of the debtor subject to such restrictions as are contained in the plan of reorganization upon the transfer of its assets by the Trustee to the reorganized company.

2. The Trustee is ordered and directed, upon the consummation of the $1,250,000 loan to be obtained by the reorganized company from The Florida National Bank of Jacksonville, to deposit in a separate bank account the sum of $1,116,615.60 for the benefit of all claimants in Classes 1, 2 and 3 whose claims have not been liquidated as stated heretofore in this order.

3. The claims and liens of all creditors in Classes 1, 2 and 3 (other than the claims of the Commonwealth of Puerto Rico) are hereby transferred to the fund of $1,116.615.60 to be created pursuant to paragraph 2 above, and the claimants in Classes, 1, 2 and 3, after the creation of said fund, shall have no claim against any of the other assets of the debtor and shall thereafter have no claim against any of the assets of the reorganized company.

4. The Trustee is ordered and directed to proceed promptly to liquidate, and determine the proper amount of all claims in Classes 1, 2 and 3 which are to be secured by the $1,116.615.60 fund created pursuant to paragraph 2 above, and to pay said claims from said fund.

5. The Trustee is ordered and directed to pay all liquidated claims required by the plan of reorganization to be paid in cash upon consummation of the plan, when the proceeds of the said $1,250,000 bank loan are available.

District Court Order Approving Consummation of Plan of Reorganization.

6. The Trustee is ordered and directed, upon consummation of said $1,250,000 bank loan, to transfer to the reorganized company all assets of the debtor not required by the plan of reorganization to be retained by the Trusteeship, except cash assets required to create the said $1,116,615.60 fund for the benefit of creditors in Classes 1, 2 and 3. All assets transferred to the reorganized debtor shall be free and clear of all claims against the debtor except current liabilities arising from the operation of the debtor.

7. The reorganized company under the supervision and direction of the Trustee, shall issue the new common stock of the debtor to those creditors entitled thereto under the plan or reorganization on the basis of one share of stock for each $3.10 of claim, with no fractional shares issued. Every stock certificate issued shall bear a notation, until the further order of the court, referring to the pending appeals which seek to change certain provisions in the plan of reorganization.

8. The Trustee shall take such further action as may be required to complete consummation of the Plan of reorganization.

DONE and ORDERED at Miami, Dade County, Florida, this .... day of September, 1965.

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United States District Judge